No. 10,526

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. MORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellants,

vs.

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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND STATEMENT OF FACTS CONCERNING JURISDICTION.

This action was brought by eleven former employees (appellants) of the Summit King Mines, Limited, a Nevada corporation (appellee), against their former employer, seeking to recover alleged unpaid overtime compensation, penalties and attorneys' fees. (Rec. 2-11.) The action was based upon appellant's alleged right of recovery therefor under the provisions of "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U.S.C.A. 201-219, 52 Statutes 1060).

The appellee, by its answer, denied that there was any unpaid compensation due to the appellants and by its answer also denied that it was engaged in commerce within the provisions of the "Fair Labor Standards Act of 1938". (Rec. 12-14.)

The claim of the appellants was that each of the plaintiffs involved had worked a period of eight hours each day of their employment for the period prior to April 22, 1941, had only been paid for seven hours, and that during the period of employment subsequent to April 22, 1941, they had worked for eight hours each day and had not been paid for forty-eight and forty-nine minutes of such time, each day during that period. (Rec. 4-5.) Appellants contended that while the company had ostensibly allowed them, prior to April 22, 1941, a full one hour lunch period and subsequent to April 22, 1941, forty-eight or forty-nine minutes for a lunch period, that such time was not actually available to them and that they were compelled by their duties to remain in attendance upon their work for the full period of eight hours each day. (Rec. 55-57, 105-106, 125-127.)

The Company's position was that prior to April 22, 1941, all of the plaintiffs who had been employed during such period had had available to them a full one hour's free time within which to eat their lunch or in which they might occupy themselves as they saw fit free of any duties and that the men did utilize this free time in eating their lunch, resting, reading, changing their clothes and taking showers. (Rec. 67-68, 152, 155-157, 167, 206-207.) The company contended

that after April 23, 1941, in order to grant the men more overtime, the lunch period was reduced to forty-eight or forty-nine minutes, depending upon the work the men performed and the men were paid overtime for the extra eleven or twelve minutes worked each day. During this latter period all of the men had such forty-eight or forty-nine minutes daily available to them free of duties (Rec. 64-65), so appellee contended, and which time they utilized for their own benefits. (Rec. 151-152.) Its position, therefore, was that the men had been paid in full all compensations due them.

The case was tried before the District Court, without a jury, and the District Court found in favor of the defendant and against the contentions of the appellants, upon the merits of the controversy. It further held that none of the appellants, during his period of employment by appellee, was engaged in commerce or in the production of goods for commerce. (Rec. 27-31.) It therefore ordered judgment entered accordingly. (Rec. 30-31-32.) From this judgment appellants have appealed. (Rec. 32-33.)

STATEMENT OF THE CASE.

The appellee, Summit King Mines, Limited, is a Nevada corporation and at the time of the proceedings herein involved, was engaged in the mining and milling of gold and silver ores at its mine and mill located in Churchill County, Nevada, some thirty miles from the City of Fallon, Nevada. (Rec. 3, 12.) The product

of its operations was gold and silver bullion, which was shipped direct by United States mail from the mine to the United States government, at the United States mint at San Francisco, California. (Rec. 15.)

The mill operated by the appellee was a small mill of seventy ton capacity, but which actually turned out a daily tonnage of only about fifty-four and one-half tons. (Rec. 153-154.) In the mill certain machinery was used, including a ball mill, classifier, several agitators and thickeners and two diesel engines. (Rec. 183.)

The operations of the mill and its processes produced precipitates which were taken from the mill from time to time and milled into bullion. (Rec. 82, 183.)

The mill operated continuously twenty-four hours a day. (Rec. 46.) The work in the mill was divided into three shifts. The day shift commenced at 7 o'clock in the morning and ended at 3 o'clock in the afternoon. The afternoon shift commenced at 3 o'clock in the afternoon and ended at 11 P.M. The "graveyard" shift commenced at 11 P.M. and ended at 7 A.M., the following morning. (Rec. 46.) Two men were employed on each of the three shifts. During the periods of which the appellants here complain, one man was employed as a ball mill man and one man as a solution man, the latter being in charge of the shift. (Rec. 48.)

The evidence of the appellee tended to establish that in so small a mill, one man on each shift could handle

the work and one man could therefore relieve the other for any necessary period. (Rec. 179-180.) At the date of the trial of the action, the mill was being so operated solely by one man on some shifts. (Rec. 208.)

The duties of the ball mill man were to check the tonnage and classifier overflow, and ball mill density gravity, to take a sample of classified overflow for values and for grind, to take a mill sample, add cyanide or lime, and titrate the primary thickener solution for lime and cyanide and to weigh the solution for tonnage. (Rec. 47-48.)

The duties of the solution man were to operate the solution end of the mill, take samples, do the titration, weigh the pulp for gravity, take care of the precipitation, see that the solutions in the tanks were kept at the right levels and to watch the Diesels. (Rec. 58-60, 104-105.)

Written entries were made by the ball mill man once an hour and by the solution man three or four times a shift upon sheets furnished by the appellee for that purpose. (Rec. 59.)

Only about 50% of these men's time was occupied in manual labor. The remaining part of their working time was occupied simply in overseeing the various machines and processes to see that the mill was functioning properly. (Rec. 86, 184-185.)

All of the appellants had, at a time previous to the action, been employed either as ball mill men or solution men at appellee's said mill. (Rec. 4, 13.)

The mill men that were employed by appellee made out their own time cards, showing the hours worked each shift. (Rec. 61, 116-117.) Their cards were signed by the solution man, who was in charge of the mill during that shift and at a later date signed by the mill superintendent. (See original exhibits sent to Circuit Court of Appeals.) In none of the time cards made out by the appellants here involved was there any overtime claimed which was not paid for, prior to this action, by the appellee. (Rec. 116-117, 29.) (Original Exhibits E, G, and I to P, inclusive.)

The mill of appellee began operations on January 5, 1940, when the forty-two hour week was in effect, under the Fair Labor Standards Act, and was in continuous operation up to the date of the trial in the District Court of this action.

On December 29, 1939, and prior to the commencement of operations in appellee's mill, there was posted in the mill a notice to the employees on a daily wage basis. This notice was to the effect that the men would work seven hour shifts relieving each other one hour for lunch; that is the ball mill operator would relieve the solution man for one hour and the solution man would relieve the ball mill man for a different hour. Thus each man was to work seven hours a day of the eight hour shift and was to work six days per week. The operator relieving was to be responsible during the lunch period for the other operator's work as well as his own. (See Defendant's Exhibit B, Rec. 67.)

The wages of the solution man from January 5, 1940, to June 11, 1940, were $6.00 per day and the

wages of the ball mill man were $5.50 per day. (Rec. 61.) This wage was increased in June of 1940 by 35¢ so that from June 12, 1940 to October 23, 1940, the wages of the solution man was $6.35 and that of the ball mill man $5.85. (Rec. 152.)

On October 23, 1940, when the forty hour week went into effect, appellee complied therewith by paying overtime for all hours over forty hours per week, but the shift remained seven hours with one hour for lunch, as theretofore, and the base wage remained unchanged.

On April 23, 1941, the men went out on strike and a committee appointed by the miners and mill men met with the manager of appellee and asked for an increase in wages. This increase was given by permitting the solution men to work eleven minutes more per shift and the ball men twelve minutes more per shift, for which overtime was paid, resulting in an increase in earnings of approximately $1.50 per week, but the lunch period was correspondingly changed to forty-nine and forty-eight minutes for the respective mill men. (Rec. 62-63, 64-65, 98.)

The evidence of the appellee is that it heard no complaints at the time of this strike that the men were not being paid overtime for any period worked during the lunch hour. (Rec. 151.) Mr. Fox's testimony corroborates this evidence. (Rec. 63.)

The various appellants were employed by appellee during the following periods: Orville Hutchins was employed January 2, 1940 to February 17, 1941; John S. Jones was employed September 10, 1940 to March

31, 1942; Warren S. Morden was employed January 2, 1940 to June 14, 1940; Edward F. O'Neill was employed January 2, 1940, to December 29, 1940; R. E. Sutton was employed from January 2, 1940 to December 3, 1940; H. M. Childers was employed May 18, 1940 to June 19, 1941; N. N. Dustin was employed January 2, 1940 to June 19, 1941; Philip Edgar Ferris was employed July 18, 1940 to March 29, 1942; Al C. Fox was employed January 5, 1940 to January 30, 1942; Collison Gilbreth was employed July 25, 1940 to June 8, 1940; Merrill C. Hutchins was employed from November 5, 1940 to June 20, 1941. (Original Exhibits E, F, H, I to P, inclusive.)

The evidence of both appellants and appellee shows that the rule prescribed by the company for each man to have a definite hour for his lunch period was not observed strictly by the men nor was it strictly enforced by the company. The evidence shows the men ate their lunch at such times as was most convenient to them. The evidence of the appellee showed that each of the men were allowed and utilized at least their full hour of free time during each shift in eating lunch, resting or utilizing the time before the end of the shift to change clothes and take showers. (Rec. 145-150, 164, 193-206.) The attitude of the appellee was that it was best not to antagonize the men by insisting that they use their free time all in the same hour, but the company allowed them to utilize it in such manner as they saw fit so long as their free time did not unduly exceed the hour allowed. (Rec. 164, 206-207.) The testimony on the part of the appellee can be summarized as showing that the men usually

ate lunch or rested for a half hour or more during each shift, and used another half hour or more in changing clothes and taking showers at the end of the shift.

Only three of the appellants testified—Mr. Fox, Mr. Childers and Mr. Morden. (Rec. 45-143.) None of them gave any direct testimony as to the specific time they worked in any given work week. The substance of their testimony was to the effect that they were never able to take a *full* hour's time out during each eight hour shift away from their work. (Rec. 56, 105-106, 125-127.) They testified that they were sometimes interrupted in their lunch to perform duties. (Rec. 56, 105-106, 125-127.) This testimony was contradicted on the part of appellee. (Rec. 146-150, 206-207.) They all admitted taking time out from their duties for their lunch of varying lengths. (Rec. 70, 109, 127.) The testimony of these appellants as to how much of their free time was actually used is exceedingly vague. Mr. Childers testified that he was interrupted during his lunch period *several* times to perform duties. (Rec. 105-106.) Mr. Childers admitted using the change house, some distance from the mill, for the purpose of taking showers and changing his clothes during the shift. (Rec. 110.) Mr. Morden denied he ever took a shower during the shift, but admitted that for a while he used the change house at the beginning and end of a shift to change clothes. (Rec. 141.) Mr. Fox denied he had ever taken a shower during the shift, but did not deny that he had used the change house for the purpose of changing his clothes as testified

to on the part of appellee. (Rec. 228-229.) No evidence was offered by the appellants as to the time actually worked by appellants Collison Gilbreth, R. E. Sutton, Orville Hutchins, John S. Jones, Nephi N. Dustin, Merrill C. Hutchins, Edward F. O'Neill and Philip Edgar Ferris, or how they spent their free time, except Mr. Fox testified, "Their routine of work and practice of eating lunch was the same as his". (Rec. 57.)

Upon all of the testimony the lower Court found to the effect that plaintiffs' claim for overtime work had not been sustained. It further found that each of the plaintiffs had been free of duty for the period of one hour during each shift and had been paid overtime for all hours worked in excess of forty-two hours a week during the period of employment from January, 1940, to October, 1940, and that from October, 1940, to the termination of his employment each of the plaintiffs had been paid overtime for all hours worked in excess of forty hours per week. It likewise found that none of the plaintiffs had performed any work or labor for the defendant during the lunch hour or at any other time for which he had not received his overtime pay. It found that none of the plaintiffs had made any claim for payment of overtime until the making of demand upon defendant prior to the filing of the action in the present case. It further found that none of the plaintiffs during the period of employment by defendant was engaged in commerce or in the production of goods for commerce. (Rec. 28-30.)

The Court entered judgment accordingly for the defendant, the appellee here. (Rec. 31-32.)

From this judgment the appellants have appealed and have assigned as error the various findings of fact and conclusions of law of the District Court wherein the District Court found the appellants were not entitled to overtime and have also assigned as error the findings of the District Court that the appellants herein were not engaged in commerce or in the production of goods for commerce.

In their brief filed herein, appellants have discussed the alleged errors under five headings. The questions discussed under these headings all involve either one of the two following matters: Whether the District Court was justified by the evidence in finding that appellants herein were not entitled to any overtime pay; whether appellants, during their employment by appellee were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

The administrator of the Wage and Hour Division of the United States Department of Labor, has filed herein as amicus curiae, a brief upon the second question above mentioned, but has not submitted any brief upon the first matter, and states in his brief that the administrator is not primarily interested in that question.

QUESTIONS INVOLVED.

The questions involved on this appeal logically fall into the following two divisions:

1. Was the District Court justified by the evidence in finding that appellants herein were not entitled to any overtime pay?

2. Were appellants, during their employment by appellee, engaged in the production of goods for commerce within the meaning of the Fair Standards of Labor Act.

ARGUMENT.

1. WAS THE DISTRICT COURT JUSTIFIED BY THE EVIDENCE IN FINDING THAT APPELLANTS HEREIN WERE NOT ENTITLED TO ANY OVERTIME PAY?

The action of appellants is grounded upon the Fair Labor Standards Act of 1938 (29 U.S.C.A., Sec. 201 to 219).

By Sec. 207 of that Act, it is provided, in substance, that no employer should employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work week longer than forty-two hours during the second year from the enactment of the Act, or for a work week of forty hours after the expiration of the second year from the enactment of the Act unless the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

By Sec. 203, subdivision g, "employ" includes "to suffer or permit to work."

The gist of the appellants' action, therefore, is that the appellee here suffered or permitted the appellants to *work* longer than forty-two hours per week prior to the expiration of the second year after the Act became effective, and to *work* for a work week of more than forty hours after the expiration of the second year after the Act became effective without paying the required overtime.

In this case the appellants were present on the appellee's property eight hours of each day during their respective times of employment. How much of that time they were suffered or permitted to *work* depends upon the use they made of the free time granted by the appellee during each shift.

In the case of *Skidmore v. Swift & Co.,* 136 Fed. (2d) 112, (C.C.A. 5th Circuit) the Circuit Court for the Fifth Circuit points out the distinction that must be kept in mind in this character of case between "working" and "being available for work."

The Court in that case said:

> "The Act does not require payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work.'
>
> Plaintiffs, in their proof, have failed to segregate sleeping time from non-sleeping, pool,

> domino, and radio, playing time. Even if the plaintiffs had been entitled to recover for hours spent in boredom, or waiting for bedtime, or an alarm, the proof wholly fails to prove the actual hours spent either in sleeping, playing pool, dominoes, or radio, *dressing,* shaving, *bathing,* or in any of said enterprises, the burden of which was on the plaintiffs.
>
> The judgment below is affirmed." (Italics ours.)

The appellee contends that the facts shown in the District Court do not justify the appellants' contention that they were suffered or permitted to work during the free time provided for by appellee, and the District Court was correct in so holding.

The findings of the lower Court are contrary to the contentions of appellants.

Rule 52 of the Federal Rules of Civil Procedure provides, in part, as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

If the findings of the District Court are supported by substantial evidence and are not clearly erroneous the judgment of the District Court should be affirmed. (See *United States v. Foster,* (C.C.A. 9th Circuit) 123 Fed. (2d) 32.)

The burden of proof in the lower Court was on the appellants and if they failed to establish by a pre-

ponderance of the testimony that they had actually worked overtime hours for which they were not paid, then they were not entitled to recover and the judgment of the District Court is correct. (See *Lowrimoore v. Union Bag and Paper Corp.* (D. C., S. D. Ga. 1939) 30 Fed. Supp. 647.)

The burden was likewise upon appellants, as pointed out by *Skidmore v. Swift & Co.* (supra) to show how they spent their time while on the property and how much was spent in eating lunch, taking showers, changing clothes and resting.

It is apparently the theory of the appellants that when they were eating their lunches that they were in such close proximity to their work that they were rendering service to the employer by observing the equipment and the machinery of the mill and were entitled to this time as hours worked. The weight of the evidence will not bear out appellants' theory in this respect. As will be hereinafter pointed out, the testimony shows many of the men ate their lunch in the office, or where only a small part of the mill might be seen, many outside of the mill altogether, some in the change room, and in the case of one man, usually he visited in the assay office some distance from the mill proper.

In the brief of appellants, at page 57, in referring to the time spent by the men changing their clothes, resting, reading and in taking showers, it is stated:

> "The appellee evidently relies to a great extent upon the appellants taking advantage of the com-

pany's time in loafing with their lunch boxes open, reading on shift and taking showers before the shift was ended but in that respect, we must contend that the employees were, at all times, under the control of the mill superintendent and such practices, if indulged in, could have been restricted or prohibited."

At page 46 of appellants' brief, it is also stated:

"The appellee has attempted to show by its witnesses that the appellants spent a half hour or more in taking a shower and changing their clothes in the change-room, which evidence is also very indefinite and there has been no showing on the part of the appellee that such time was to be deducted or could be deducted from appellants' wages or periods of employment. If the men took time to take a shower or change their clothes, it was during the latter part of their shift and before leaving their places of employment and hence could not be connected in any way with the lunch period for which time was deducted in the manner stated in the rules posted on December 29, 1939, and April 22, 1941.

If the manager and the superintendent knew of such practice, and had any objection to it, then they could easily have put a stop to that practice or discharged such employees if they were doing so on company time, for neglecting their duties."

Appellants apparently misconceive the requirement of the statute. An employer is not required to pay overtime for hours not *worked.* Furthermore, as pointed out in *Skidmore v. Swift & Co.* (supra), the burden is upon the employee in a case of this char-

acter to show how much time was spent in work and the amount spent by the employee in activities in his own behalf. This was not attempted by the appellants in the District Court. It is the contention of appellee that the evidence in the District Court amply supports the conclusion of the trial Court that the appellants did not work more than seven hours per day; that they were not working when they were eating their lunch, or resting after their lunch period, nor were they working in the time used to change their clothes or take showers.

The following is illustrative of the evidence.

Mr. Dobson, manager of the mine and mill, testified that he went to the mill two or three times a week and spent from forty-five minutes to two hours examining the mill records; that during that time he had an opportunity to observe the various plaintiffs in this action. His testimony was that Mr. Fox had his lunch sometimes in the mill office and sometimes on a bench outside the mill office and sometimes sitting on some steps; that Mr. Fox was always leisurely about eating his lunch and would spend well over a half-hour in doing so. He further testified that never once did he see Mr. Fox get up and go around the mill or interrupt his lunch. (Rec. 146-147.) His testimony as to Mr. Childers was similar. (Rec. 147.) Mr. Dobson testified that Mr. Morden spent one-half an hour or a little better eating his lunch in the mill; that he couldn't recollect seeing him go around the mill while he was eating. (Rec. 147-148.) Mr. Dobson testified that he saw Mr. Orville Hutchins eating his

lunch in the mill and that he took a little longer than the others—a good forty-five minutes; that many times Mr. Dobson saw him in the change room during the lunch period; that Mr. Hutchins never interrupted his lunch to work around the mill. (Rec. 148-149.) His testimony as to Mr. Jones was similar. (Rec. 149.) His recollection as to Mr. O'Neill was that he took longer than the others—about forty-five minutes, and he did not see Mr. O'Neill get up and go around the mill and attend to any duties while he was eating. (Rec. 149.) Mr. Sutton, he testified, took about the same time as the others and Mr. Dustin was the same, and neither of these parties did he ever see interrupt their lunch to work about the mill. (Rec. 149-150.) As to Mr. Ferris, his testimony was similar. (Rec. 150.) Mr. Dobson further testified that the men usually went to the change house *half an hour to forty-five minutes before the end of the shift and there took showers and changed clothes.* (Rec. 155-156, 165-166.)

Mr. Dobson's testimony is substantially corroborated by the testimony of Mr. Clawson, the superintendent of the mill since 1940. Mr. Clawson testified substantially the same as Mr. Dobson concerning the practice of the men in taking showers and changing clothes during the shift period. (Rec. 203-204.) Mr. Dobson testified that they were permitted to do this so as to finish off the lunch hour. (Rec. 167.) Mr. Clawson's testimony as to the time spent by the men in eating their lunch was similar to that of Mr. Dobson. He testified that Mr. Fox ate lunch either inside or just outside the office. (Rec. 193.) That Mr. Gilbreth ate

lunch in the office and at times took a great deal of time, sometimes as much as one and one-half hours. (Rec. 194-5.) His testimony as to Mr. Jones was that Mr. Jones did stay as much time as possible in the office all through the shift, and that he spent as long as one and one-half hours in eating his lunch. (Rec. 197.) As to Mr. Orville Hutchins, he visited around during the lunch hour and often spent well over an hour in eating. That Mr. Hutchins often went to the assay office and to the main hoist house and to the change room during the lunch hour. (Rec. 197-198.) He further testified that Mr. Dustin's practice was to take time off in the office or in the assay office where he had been a helper. (Rec. 198-199.) That Merrill C. Hutchins consumed fifteen to twenty minutes actually eating his lunch and sat around for fifteen or twenty minutes after eating, and sometimes more. (Rec. 199.) That Mr. Childers took from fifteen to twenty minutes actually eating his lunch and then sat around in the office. That most of the men tried to consume the big end of their lunch hour sitting down and taking their own time. (Rec. 200.) As to Mr. Morden, he testified that he consumed fifteen to twenty minutes for his meals, but that he did not know how he would use his time after he had finished eating. (Rec. 201.) He stated that Mr. O'Neill's practice was to take a very long lunch hour, at one time two and one-half hours and that on all other occasions he consumed his full hour. (Rec. 202.) That Mr. Ferris consumed from fifteen to twenty-five minutes eating his meal and after finishing he usually sat around in the office for a period of thirty minutes. (Rec. 203.)

The position of the management of the appellee, as expressed both by Mr. Dobson and Mr. Clawson was that the mill men were free from all supervision for a period of one hour during their shifts prior to April 22, 1941 and for forty-eight or forty-nine minutes subsequent to April 22, 1941. (Rec. 151, 174-175, 205-206.) Mr. Clawson expressly testified that if a man spent twenty minutes in actually eating his lunch and sat down for forty minutes more and told Mr. Clawson that it was his lunch period, then he was entitled to take that time out. (Rec. 206-207.) On many occasions Mr. Clawson found the men sitting down after eating hours or after they had finished their lunch and if the men told him that it was their lunch period he wouldn't bother them. (Rec. 207.) Mr. Dobson testified that it was the general practice that the men could eat their lunch when and where they wanted. Only if they took more than an hour would their attention be called to it. (Rec. 155.) He further testified that the management knew the men were changing clothes and taking showers on company time and that it was an adjustment due the men if they didn't take a full hour in their lunch period. (Rec. 155-156.) Mr. Dobson further testified that any time the men worked during the lunch hour and placed it on the time cards that they were paid for it. (Rec. 163, 178.)

As to all of this testimony of the appellee, there is no contradictory testimony so far as it concerns the appellants, other than Fox, Childers and Morden. None of the other appellants testified in the action

although appellant Jones was sworn, (Rec. 45), but did not testify.

In view of the testimony submitted in the District Court, it is the contention of appellee that the findings of the lower court certainly are not "clearly erroneous," within Rule 52 of The Rules of Federal Procedure.

Furthermore even if the evidence of the appellants who did testify in the District Court had been taken at its full value and if the trial court had concluded therefrom that such appellants had not had available to themselves a *full* hour any shift, any judgment as to the amount of time worked would have been wholly speculative.

See *Jax Beer v. Redfern,* 124 Fed. (2d) 172, where the court of appeals for the Fifth Circuit held:

> "The evidence as to the material facts in the case is so uncertain and conjectural that we find nothing substantial upon which to predicate a verdict. To uphold the findings and judgment of the lower court we must base decision upon the guess, speculation, and averages made up from the uncertain recollections of these appellees. This we refuse to do."

A somewhat similar contention, as made by the appellants here as to their lunch time, was made by the Union Miners at the Mill-Mine Conference held before the Wage and Hour Division of the Department of Labor in Salt Lake City on December 11 and 12, 1940. The evidence offered by the Union at that hearing, in support of its contention that the lunch hour

should be included in the hours worked is, in many respects, identical with the evidence offered in this case. In that case it was testified that the lunch period which was from thirty to thirty-five minutes, was underground; that the employees were not permitted to roam around very far from their place of employment; that shift bosses could come around during the lunch period and give assignments of work for that period which would require the men to work while other men were having their lunch; that the men did not always eat at a regular hour, but ate when they were hungry and that the men always ate no more than fifty to one hundred feet from the place of work. It was also testified that during the lunch period men had to walk a distance of 5000 to 6000 feet to pick up tools to be used in their work in the afternoon following. Men testified that they always considered the lunch period as part of the workday; that they were on the job and they were close to the job and had no opportunity to get away from it. (Transcript of the hearing of the Metal Mining Conference, Dec. 11 and 12, 1940, pp. 41 and following, 85 and following, 35 and following, 102 and following.)

Despite this evidence, in a ruling issued by the Administrator of the Wage and Hour Division after the report of the Examiner at that hearing, it was stated that the lunch hour was not to be considered as hours worked and that the men were not entitled to compensation therefor. In this ruling it is said:

> "After arrival at the working face miners begin work and continue until the lunch period.

In a few mines there is no fixed lunch period and the men snatch a bite to eat from time to time during the day. In most mines, however, it is customary to have a set lunch period, usually of half an hour, although occasionally of one hour. Except for those mines where the miners work fairly near the surface and are able to walk out of the mine easily, lunch is eaten underground. The miners ordinarily congregate at some convenient place not far from their working face. In a number of mines heated or dry places and lunch tables are provided. In general, however, the lunch is brief, at or near the workplace and without formalities or conveniences that would interfere with an instant return to work.

* * * * * * *

Both unions contend that the workday should include the lunch period. The mine operators contend in general that the lunch period should not be counted as part of the workday. In Interpretative Bulletin No. 13 this matter is left open:

> 'No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.'

It should be pointed out, first, that in many mines the lunch period is not paid for. It may also be noted that in some mines there is no lunch period. In support of their contention, the unions refer to the fact that on occasion a miner may be instructed to defer or advance his lunch period on instructions from his superior. They also point out that on some occasions the miners may use their lunch period for obtaining tools or on other

occasions they may not eat during the whole of the period. These contentions do not go to the heart of the matter. The question to be determined is whether or not a full lunch period of not less than one-half hour should be considered as 'hours worked.'

* * * * * * *

Some of the hazards of underground employment continue and it is unquestionably less relaxation for a miner to eat underground than it would be to eat on the surface. His movements are necessarily limited and his opportunity for rest is constricted. However, these are matters of degree. In spite of these disadvantages there remains a sharp distinction on the one hand between the time when the miner is drilling, etc., or traveling to his place of work, and on the other hand, the lunch period. There is a considerable element of relaxation involved and except for safety restrictions the miner is free from supervision for the lunch period. Balancing these opposing considerations it is felt that the lunch period of one-half hour or more, in general, to the extent that it is actually used as a period for lunch or relaxation, should not be counted as hours worked under the act.

* * * * * * *

The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

This ruling was followed by an action for declaratory relief brought in the District Court of the United States for the District of Idaho in the case

of *Sunshine Mining Co. v. Carver,* 41 Fed. Sup. 60, wherein the union offered exactly the same evidence as was offered at the Metal Mining Conference in Salt Lake City in respect to the practices of employer and employee during the lunch hour. In following the ruling of the Administrator in holding that the lunch hour constituted no part of hours worked, the court says at page 66 of 41 Fed. Sup.:

> "Second, should the time consumed at the lunch period be included as time worked? The method used by plaintiff and the employees, in determining what that time is, appears to be that the underground workmen records on a card each day, the time he actually worked, and delivers it to the foreman, and should he work a part of that period he is paid overtime for the part he did so work. The keeping of it is left to the honor of the employee and the method seems to be fair to the workmen. Before and after the adoption of the Wage and Hour Law the lunch period has been set aside as non-working time and that was recognized by the Union who did not consider the lunch period as time worked, as appears by the proposed contracts they submitted to the plaintiff. They knew before entering the mine that they are granted a lunch period of a certain time in which to eat their lunch and rest while in the mine, and when in doing so they are relieved of all duties. Under such circumstances, in the absence of an agreement, between the employer and employee, that the lunch period should be work time, the conclusion is inevitable that one would not be actually working while he is

eating his lunch or resting, for he is not at that time rendering any services."

It is likewise true in the present case that the time cards were filled out by the employees, and the testimony was that no man asking overtime was ever refused it.

A second decision following the ruling of the Administrator is that of *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (D.C., N.D. Ala. S.D.), 40 Fed. Sup. 4. In holding that the lunch hour could not be included in the hours worked and as part of the work week for which the employees should be paid overtime, the court says at page 10:

"We conclude that the fixed lunch periods of one-half hour during which the employees have been relieved of all duties are not part of their employment or of their workweek.

The conclusions here stated have been reached by examination of the facts existent in the plaintiffs' mines during the period in which the underground ore miners are claiming that they earned unpaid compensation for overtime work under the provisions of the Fair Labor Standards Act. It may be helpful, however, to observe that these conclusions are the same as those announced in the summary of the so-called 'modified portal to portal' opinion of the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941, which summary is as follows:

'The workday in underground metal mining starts when the miner reports for duty as re-

quired at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

'The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

'The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground.' "

Appellants rely upon the following cases to sustain their conclusions: *Walling v. Dunbar Transfer and Storage Company, Inc.,* a District Court case from the Western District of Tennessee reported in 6 *Wage and Hour Reports* 676; *Fleming v. Rex Oil and Gas Company,* 43 Fed. Sup. 950, a case involving oil drillers required to watch the oil pumps during their entire shift; and *Travis v. Ray,* 41 Fed. Sup. 6, which involved a question of waiting periods between trips by motor bus drivers.

It would appear to appellee that all of such cases are distinguishable from the facts to the case at bar. In Walling v. Dunbar Transfer, it appears from the statement of facts given in appellants' brief that the men ate their lunches while actually working, that is delivering cargos or while waiting at the customer's place of business, and that in other instances the employees had no lunch and took no time off for lunch, but were docked thirty minutes for lunch and on some occasions, one hour. Obviously the plaintiffs in the Dunbar case, from this statement of facts, did not

have the lunch time as their own time, but were required to perform their duties through the lunch period.

In the *Fleming v. Rex Oil and Gas Company* case the drillers were apparently required to watch the operation of the pumps and check on them during their entire shift and were not allowed any free time to themselves. In the case of *Travis v. Ray,* the motor bus drivers were expected to be on the job during the periods between trips and the court points out that the time was not long enough to enable them to go elsewhere or to engage in any other activity.

Appellee submits that these cases are not authority for the position taken by appellants here.

In this connection, the case of *Gordon v. Paducah Ice Mfg. Co.,* 41 Fed. Sup. 980 (District Court, Western District of Kentucky), is more analogous to the situation here existing. In this case the employer was a manufacturer and seller of ice to railroad carriers for the icing of refrigerator cars. Employees performed labor incident to icing the cars over a 24 hour period, which was divided into two 12 hour shifts. After the cars were spotted, the foreman would select a number of men required to perform the work, and when the icing of that particular car was completed, the men were released from further immediate labor, but would remain in the immediate vicinity available for work. The employees contended that this time while they were in the immediate vicinity and subject to call for duty by the foreman was to be included

within the hours of work in the particular work week. The Court says at page 986 of 41 F.S.:

> "Defendant contends that since the plaintiffs were paid at the rate of 30 cents an hour for the entire time in which they were actually engaged in icing refrigerator cars, and since the evidence fails to show that any employee was so engaged for more than 42 hours in any one work week, the plaintiffs have been paid in full, even under the provisions of the Act. This contention is correct if the waiting time between the icing of successive cars is not included in the hours of labor. If such waiting time is included, the work week, consisting of 12 hours per day, exceeds the 42 hour maximum. Plaintiffs rely upon the decisions in Missouri, K. & T.R. Co. v. United States, 231 U.S. 112, 34 S.Ct. 26, 58 L. Ed. 144; United States v. Southern Pacific Co., 9 Cir., 245 F. 722; Chicago, R.I. & P.R. Co. v. United States, 8 Cr., 253 F. 555, and other similar decisions, in which it was held that waiting time under the conditions existing therein should be included within the hours of service. But those cases specifically point out that although the men were waiting and doing nothing they were under orders, liable to be called upon at any moment and not at liberty to go away. As was said in Missouri, K. & T.R. Co. v. United States, supra (231 U.S. 112, 34 S.Ct. 27, 58 L. Ed. 144) 'they were none the less on duty when inactive. Their duty was to stand and wait.' The brief of the Administrator, in relying upon these cases, proceeds upon the assumption that the plaintiffs in the present case were required to be on hand at all times, regardless of the length of time it might be before the arrival of the next car. If such were the facts in this case, the

> Administrator's contention would probably be sound, but as has been indicated in the Findings of Fact hereinabove, the situation with respect to these employees was entirely different. They were free to report or not to report as they saw fit; to leave at any time they wished without discrimination if they later decided to return for any work which was available. Although they did stand and wait, yet there was no duty upon them to do so. It seems to the Court that it was simply a case of there being many more applicants for the available work than was needed; and an effort on the part of the defendant to distribute the work fairly evenly among those who needed it and were willing to be present when their services could be used. The situation is essentially different from the facts in the case of Travis v. Ray, D.C., 41 F. Sup. 6, recently decided by this Court and in which the Court held that waiting time should be included within the hours of labor. Accordingly, I hold as a matter of law that the waiting time in the present case should not be included within the hours of labor in any particular work week under consideration."

The above case is extremely pertinent in respect to the situation in the case at bar. In this case the undisputed testimony is that one of the men on each shift was free to leave during his lunch hour, leaving the mill in charge of his partner on the shift. The reason the men did not leave the mill was not that their duties were so onerous as to require their presence in the mill, but was purely a matter of convenience, because there was no nearby town and the mill was the warmest and most comfortable spot in which to

eat their lunch. In the present case when one man had finished his lunch, the other millman was perfectly free to do the same thing, and Mr. Morden's testimony is that one man could leave the mill, and the responsibilities of the mill in such case could be handled by his partner. (Rec. 138-139.)

Grave doubt is cast upon the credibility of the witnesses for the plaintiff by the fact that at no time during the period of their employment, (in the case of Mr. Fox 2 years 3 months and that of Mr. Childers a period of 13 months, and that of Mr. Morden a period of 6 months), did any of the appellants make any complaint to the management of the appellee that they were working eight hours and being paid for only seven hours. The men filled out their own time cards on which they placed seven hours of labor for the period prior to April 22, 1941, and seven hours and eleven or twelve minutes, as the case might be, subsequent to April 22, 1941. (Rec. 53-55, 99, 116-117, 132-135.) These witnesses testified that they never put on their time cards any overtime for work during the lunch hour although Mr. Dobson, General Manager of appellee and Mr. Clawson, mill superintendent, testified that the men were never refused overtime when it was asked. Long after the termination of their employment these men make demand for overtime compensation upon a claim that they engaged upon the work of the employer during the lunch hour.

In the case of *Mortenson v. Western Light and Telephone Co.* (D.C., S.D. Iowa W. Div. 1941, 42 Fed. Sup. 319), employees under similar circumstances

were held estopped from claiming that their reports were incorrect.

Even though the rule in the above cited case be not applied, yet the District Court had the right to consider, and should have considered these facts on the issue of whether or not the appellants had performed their right to recover.

In the case of *Sauls v. Martin,* 45 Fed. Sup. 801 (D.C. Western District of South Carolina) the court says:

> "As the courts have held, he did not, as a matter of law, by failing to report and collect for overtime hours, waive his right to overtime pay if entitled thereto; but the court can and should consider the circumstances of his failure to report and make claim for this compensation when he should have done so, as above stated, in determining the weight of his testimony on this issue."

Likewise, in the case of *Brown v. Carter Drilling Co.* (District Court, Southern District of Texas) 38 F.S. 489, in an action by the employee to recover overtime, the court says:

> "Certainly the evidence offered by an employee such as is plaintiff who has long received and accepted without protest the pay called for in his contract of employment and who after long delay, and without any reasonable explanation of the delay, sues to recover compensation for overtime and penalties, should be convincing both as to whether such employee is working in commerce and as to the terms of his employment:"

In the case of *Hackworth v. Caddo River Lumber Co.* (District Court, Western District of Arkansas), reported in *Prentice-Hall Labor Service,* Paragraph 11409, in denying recovery for overtime for lunch periods, the court says:

> "They were all paid from time to time for certain overtime at the rate of one and a half times their regular hourly rate and the testimony shows that no complaint was made by any of them until the matter was agitated by the plaintiff, J. D. Hackworth."

Likewise, in the case of *Jackson v. Mid-Continent Petroleum Corporation* (District Court, Eastern District of Oklahoma), as yet unreported, *Prentice Hall Labor Service,* Paragraph 11901, certain truck drivers brought action for overtime compensation. It was their custom to report to the defendant's warehouse each morning to see if there were any orders. If there were no orders, the plaintiffs were free to come and go as they saw fit. Their practice, however, was to stay around the vicinity of the warehouse, and if orders came for a particular driver, he would be called and proceed upon his trip. Plaintiffs were required to fill out and file with defendant weekly time sheets which were signed by the plaintiffs, and the plaintiffs were paid all sums due according to the reports. Plaintiffs never before made any claim for overtime while employed. The Court held that the plaintiffs were not entitled to overtime compensation and rendered judgment for the defendant.

In view of all the evidence, it is appellee's contention,

1. That appellants failed to sustain the burden of proof required of them in the District Court, and

2. That the findings of the District Court that appellants performed no overtime work for which they have not been paid is sustained by the weight of the evidence and therefore cannot be "clearly erroneous."

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2. WERE APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT?

As heretofore pointed out, the District Court in its findings of fact found "that none of the plaintiffs during his period of employment by defendant was engaged in commerce or in the production of goods for commerce." (Rec. 28.)

No evidence was introduced in the District Court upon this point, but it was stipulated that the defendant produced gold and silver ores in Churchill County, Nevada, and that the same were reduced to bullion and transported by United States mail from Churchill County, Nevada, to San Francisco, California, and that the bullion was sold to the United States mint at San Francisco, California. (Rec. 15.)

The District Court also found that all processes of mining and reduction were within the State of Nevada, and that the precipitates of its mill were melted into a dore bullion, the same being a combination of gold and silver bullion and that this bullion was shipped by United States mail to the United

States mint at San Francisco, California, and the value of each shipment of bullion was paid by said United States mint to said defendant. (Rec. 28.)

Both the appellants here and the administrator of the Wage and Hour Division of the United States Department of Labor, in their briefs, have challenged the finding that appellants were not engaged in commerce or in the production of goods for commerce. In making this finding the District Court relied upon and approved the decision reached in *Holland v. Haile Gold Mines, Inc.* (W.D., S.C.), 44 Fed. Sup. 641. The brief of the administrator of the Wage and Hour Division points out that this case has subsequently been reversed, by the Circuit Court of Appeals for the Fourth Circuit, in 136 Fed. (2d) 102.

The *Holland v. Haile Gold Mines* case involved a situation similar to the case at bar. If the decision of the Fourth Circuit Court of Appeals is sound, then the position of the District Court here that it had no jurisdiction in the present instance and that the Fair Labor Standards Act did not apply to appellants is not well taken. However, the decision of the Circuit Court of Appeals of the Fourth Circuit is not necessarily binding upon this court.

Obviously the appellants in the present case are not *engaged* in commerce. If they come within the Act at all it must be because they were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The District Court in the *Haile* case was of the opinion that the necessary interstate aspect required by the Act was missing for

the reason that since the gold was shipped pursuant to the order of the United States, such shipment would appear to be an administrative act of the government rather than a shipment in commerce. On appeal the Circuit Court for the Fourth Circuit held that the gold did not become the property of the government until it arrived at the mint in Pennsylvania, was duly receipted for, inspected and paid for by United States Treasury check. The appellate court found because of these facts that the business conducted by Haile constituted interstate commerce within the Act and the shipment was not a mere administrative act of the government.

The second ground of the decision in the District Court in the *Haile* case was that there was no competitive market for gold in interstate commerce and therefore the wages paid in its local production could not have any effect on interstate commerce. The Circuit Court likewise rejected this contention and held that the congressional power was not limited to the regulation of interstate *competition.* In support of its holding the case of *United States v. Darby,* 85 Law. Ed. 609; 312 U.S. 100; 61 S. Ct. 451, was cited.

Both the brief of appellants and that of the administrator of the Wage and Hour Division rely on the same arguments as are advanced by the Circuit Court of Appeals for the Fourth Circuit in the *Haile* case. This court has held in *National Labor Relations Board v. Idaho Maryland Mining Corporation* (C.C. A. 9th Circuit), 98 Fed. (2d) 129, that a company engaged in mining gold and silver in California which

sold its product to a government mint in San Francisco was engaged wholly in intrastate activity and was not engaged in business affecting commerce so as to be subject to regulation under the National Labor Relations Act. In passing upon the point therein involved that the gold and silver was thereafter shipped by the mint to Denver for safe keeping, stated:

> "We regard such shipments not as commercial transactions, but as administrative acts of government. If, however, such acts may be said to constitute commerce, it is a commerce to which respondents' activities are not closely, intimately or substantially related and which respondents' labor practices do not directly or substantially affect."

While this court in *National Labor Relations Board v. Sunshine Mining Company* (C.C.A. of the Circuit), 110 Fed. (2d) 780, held a mining company, mining gold and silver, subject to the National Labor Relations Act, it must be noted in that case that the company was mining other metals besides gold and silver, including copper and lead which were eventually sold in the open market outside the State. In the case at bar, the only product sold by appellee was its bullion made up of a combination of gold and silver which was shipped to the United States mint at San Francisco. The conclusion of the Fourth Circuit Court of Appeals in the *Haile* case that the shipment of the gold was not an administrative act of the United States would seem to appellee to be questionable.

The *Gold Reserve Act of 1934,* U.S.C.A. Title 31, Sec. 440 to 446, inclusive, and the regulations issued thereunder, in effect, nationalized gold. By Sec. 442, the Secretary of the Treasury was authorized by regulations to prescribe the conditions under which gold might be acquired, transported, melted or treated, imported, exported, earmarked or held in custody only to the extent permitted by and subject to the conditions prescribed in, or pursuant to such regulations.

By Executive Order of August 28, 1933, the President of the United States prescribed, in part:

> "After thirty days from August 28, 1933, no person shall hold in his possession, or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor, issued pursuant to this part." (*Code of Fed. Regulations,* Title 31, Sec. 50.5.)

By the regulations established by the Secretary of the Treasury, the gold mined by appellee could only be sold by the United States or to a licensee authorized by the United States, at a price fixed by the United States government and at a place directed by the United States government. (See *Regulations of Secretary of Treasury, Code of Federal Regulations,* Title 31, Sec. 54.1 to 55.2.)

It will be observed that by the Executive Order above mentioned and by the regulations of the Secretary of the Treasury, and by reason of the Gold

Reserve Act of 1934, that the bullion of appellee was no longer an article of commerce, as that term is ordinarily understood, at the date of the enactment of the Fair Labor Standards Act of 1938. The person mining gold or producing gold bullion could no longer either hold or dispose of the same except by government direction. He was no longer able to sell the same in the open market. His only title or right was the right to transport or otherwise dispose of such product as the regulations of the Secretary of the Treasury might authorize. The license issued pursuant to the regulations of the Secretary of the Treasury, appellee contends, was simply an administrative act of the government of the United States and the gold of appellee must, for necessity, be transported and disposed of in accordance therewith.

Gold and silver have not, in the past, been treated as other mining products. Because of their use as a medium of exchange, the government has placed limitation upon the interests of individuals therein. In the case of *Norman v. Baltimore & Ohio Railroad Co.,* 55 S. Ct. 407, 294 U.S. 240, 79 Law. Ed. 885, the Supreme Court of the United States held:

> "'The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide 'a sound and uniform currency for the country,' and to 'secure the benefit of it to the people by appropriate legislation.' Veazie Bank v. Fenno, 8 Wall. 533, 549, 19 L. ed. 482, 488.

> "Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. Ling Su Fan v. United States, 218 U.S. 302, 310, 54 L. ed. 1049, 1050, 31 S. Ct. 21, 30 L.R.A. (N.S.) 1176. Those limitations arise from the fact that the law 'gives to such coinage a value which does not attach as a mere consequence of intrinsic value.' Their quality as legal tender is attributed by the law, aside from their bullion value. Hence, the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin,—'to prevent its outflow from the country of its origin.' Id. p. 311."

Appellee urges that gold and gold and silver bullion is no longer an article of commerce within the meaning of that term as used in the Fair Labor Standards Act of 1938, but the person mining it has at best only a qualified interest therein. His acts in respect thereto are not voluntary. It must be held and disposed of, as, when and for such compensation as the government shall direct.

It may be argued that because of the silver content contained in the bullion shipped by appellee, the situation is not similar to that where gold alone is shipped. In this connection, it is urged by appellee that because of the gold content of the bullion, it must be disposed of as the government orders. Furthermore the payment for the silver contained in the bullion by the government is not in the nature of a sale, but a charge is

made for the minting of 45% and the balance is minted and returned to the owner. (See *Code of Federal Regulations,* Supp. 1939. Title 31, Sec. 80.9.)

The second ground upon which the District Court in the *Haile* case held that the Fair Labor Standards Act could not apply to the defendant was because there was no competitive market for gold and therefore the wages paid in its local production could not have any affect on interstate commerce. The Circuit Court of the Fourth Circuit rejected this conclusion and as a basis for its holding relied upon the decision of the Supreme Court of the United States in *United States v. Darby,* 312 U.S. 100, 61 S. Ct. 451, 85 Law Ed. 609, and particularly the language in that decision reading as follows:

> "The power of Congress under the commerce clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the constitution."

Appellee urges that the language quoted from the Darby case is not applicable to the subject here under discussion. The language thus used by the Supreme Court of the United States was used in connection with its discussion of the power of Congress to prohibit the shipment of certain goods in interstate commerce. It places its holding as to the validity of the wages and hours provisions upon an entirely different ground. In discussing the validity of the Wage and Hour requirements, the court stated:

> "As appellee's employees are not alleged to be engaged in interstate commerce the validity of the prohibition turns on the question of whether

> the employment under other than the prescribed labor standards of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it."

The Court then points out that Congress has adopted an objective in the suppression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions and in that connection has recognized that in present day industry each small part might affect the whole, and that the total affect of the *competition* of many small producers might be great. Its conclusion that the wages and hours provision was valid, therefore, was based upon the fact that the wages and hours of the employees engaged in producing manufactured goods locally was so related to interstate commerce as to be within the power of Congress to regulate.

Appellee submits that the decision in *United States v. Darby* is not a precedent for the application of the same rule to the production of gold bullion. Appellee urges that the Act should not be held to extend to its production. While Congress, under its power to regulate commerce, might lawfully prohibit commerce in gold, the question here involved is whether Congress could, and did intend to reach the matter of wages and hours where such wages and hours could not affect such commerce. Here clearly the matter of sub-standard wages could not affect the commerce in gold and silver bullion. There was no competition. The gold and silver must be sold at a

fixed price either to the United States or to such person as it might designate. The reason for Congress regulating the interstate commerce of articles sold in competition is wholly lacking. It is appellee's position, therefore, that it should not be concluded that Congress regarded gold as an article of commerce within the provisions of the Fair Labor Standards Act, and that it must be presumed that Congress did not intend to legislate concerning wages and hours where the same were not so related to commerce as to affect commerce.

The language of this Court used in the case of *National Labor Relations Board v. Idaho Maryland Mining Corporation* (C.C.A. 9th Circuit), 98 Fed. (2d) 129, reads as follows:

> "The Board asserts, without proof, that respondent's production of gold is 'the production of that upon which not only domestic but world trade is based and secured;' that, 'Interstate and foreign commerce being so vitally dependent upon and so delicately adjusted to gold, necessarily the supply of gold critically affects that commerce;' and that respondent's production of gold 'constitutes the very life-blood of commerce, any interference with which would have drastic repercussions in interstate and foreign commerce.'
>
> "On the basis of these unproved and, we think, unprovable assertions, the Board asks us to hold the National Labor Relations Act applicable to respondent. This we decline to do. Jurisdiction of respondent's labor relations cannot be predicated upon the fact that it happens to be a producer of a metal which, in former times, was used as

> money, and which, in this country, still bears some relation to money. If that were sufficient to confer jurisdiction, every employer who pays wages, buys goods or spends money for any purpose—in other words, all employers—would be subject to the Act, which manifestly is not the case."

The reasoning in the foregoing is applicable, appellee contends, to the situation here presented. It should not be concluded, appellee urges, that Congress meant to regulate wages and hours of an article in which no competitive market existed and which, therefore, would not be affected by the question of whether the wages paid were high or low, or whether the hours worked were long or short.

For the foregoing reasons the judgment of the District Court should be affirmed.

Dated, Reno, Nevada.
December 8, 1943.

Respectfully submitted,
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